In the Matter of	:	**Date Issued: (Ref. 7/5/2000)**
ROY VANDERTIE	:	**Case No. 1999-LHC-1863**
Claimant	:	**1999-LHC-1864**
	:	**1999-LHC-1865**
v.	:	**1999-LHC-1866**
	:	**1999-LHC-2079**
BAY SHIPBUILDING	:	
Employer	:	
	:	
and	:	
	:	
WAUSAU INSURANCE COMPANY	:	
& SENTRY INSURANCE COMPANY	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS	:	
Party in Interest	:	
	:	

DECISION AND ORDER

This matter arises pursuant to a claim for benefits under the Longshore and Harbor Workers' Compensation Act filed by Roy Vandertie of Sturgeon Bay, Wisconsin. At all times here relevant, Vandertie was employed by Bay Shipbuilding. Bay Shipbuilding, in turn, was insured by Employers Insurance of Wausau until December 31, 1994, and by Sentry Insurance thereafter. The question presented is whether the low back pain Vandertie experienced on January 16, 1997, and subsequently is a natural progression of an injury he sustained on the job on August 10, 1994 or the consequence of a new injury or the aggravation and acceleration of a pre-existing condition. Claimant and Wausau contend that Claimant's job duties on January 16, 1997 aggravated his condition, and therefore,

Sentry is responsible for his present condition. Sentry maintains that Claimant's condition is the result of the 1994 injury and not subsequent aggravating incidents. For the reasons which follow, I find and conclude that Claimant's condition is due to the natural progression of his August 10, 1994 low back injury.

The record shows that Vandertie has worked for Bay Shipbuilding for 29 years, the last fifteen as a payloader operator, loading and unloading steel plate of varying dimensions along a painting line. Claimant testified that his job is not strenuous, but it does entail driving the heavy front-end loader all over the shipyard. Over the years, Vandertie has suffered a number of injuries to his low back. In 1980, he slipped on a steel plate greased with oil and experienced low back and right foot pain. Following surgery by Dr. Oudenhoven, Claimant returned to work with a 35 pound lifting restriction, and recalls receiving no further low back treatment until 1994. In 1989, Vandertie was pulling steel out of a rack when he injured his upper back, between the shoulder blades. He treated with Drs. Schreier and Ots, and returned to work.

On August 10, 1994, Claimant was assigned the task of moving a canister for a boiler onto a wagon. The canister was on a low table, approximately two feet high, and when he stepped back off the table, he felt something "shift" in his low back. The incident was not painful at the time, but over the next few days his condition progressively worsened. An MRI administered on September 6, 1994 was interpreted by Dr. Monette as showing a mild central posterior disc bulging at L5/S1 without encroachment on neural structures.

Vandertie visited Dr. Bachhuber on March 28, 1995 for treatment of "recurrent" low back and left leg pain. Dr. Bachhuber prescribed medication and physical therapy. On August 29, 1995 Dr. Buchhuber again reported Claimant's symptoms of back pain, and noted his complaint that therapy was not solving the problem. Dr. Kaarn Heida issued a report on April 4, 1995. In it, Dr. Heida noted that Claimant suffered upper back injuries on May 17, 1989, and right lower back and extremity injuries when he slipped on ice on March 25, 1994. According to Dr. Heida the August 10, 1994 incident resulted in the exacerbation of his right hip and lower extremity pain, to which Dr. Heida would later assess a 2% permanent partial disability. Subsequently, Dr. Owens, in a letter dated October 18, 1996, noted Claimant's history of back injuries, and described the 1994 injury as a a "minor re-aggravation to soft tissue structures without loss in functional capacity." His

prognosis, however, did anticipate continued "chronic progressive degenerative condition of the spine...." Dr. Bachhuber's office notes for 1996 indicate prescriptions he authorized but not the condition he was treating.

The record shows that Vandertie experienced right low back and right leg discomfort while driving the front end loader on January 16, 1997. He finished the workday, but overnight his condition worsened considerably. He reported to the emergency room at St. Vincent Hospital in Green Bay the next day, January 17, 1997, complaining of low back pain with radiation into the right buttock and lower extremity. His history of chronic back problems over the preceding three years was noted. The emergency room physician consulted with Dr. Bachhuber, Claimant's treating physician. The hospital report states that Dr. Bachhuber advised against any further imaging studies at that time. He informed the hospital physician that Vandertie "has been through this before" and expressed surprise that he went to the hospital for evaluation and treatment. The hospital staff then prescribed medication and released Claimant for light duty work for one week.

Vandertie reported to Dr. Bachhuber on January 23, 1997, complaining of low back and right leg pain. Dr. Bachhuber noted the history of the complaints as a "continuation of his previous injury from 08/94." Following a physical examination, and an X-ray interpreted by Dr. Ross as showing "mild DJD in the facet joints at L5/S1," Dr. Bachhuber scheduled Claimant for an MRI.

On January 24, 1997 Claimant underwent another MRI upon the referral of Dr. Bachhuber. In a report interpreting the MRI results, Dr. Kohlhase noted Claimant's history of "right leg and foot pain," and compared the results of his MRI with the results obtained by Dr. Monette in 1994. Dr. Kohlhase found an increase in the degree of disc protrusion at L5/S1 since the 1994 study, and with displacement of the S1 nerve root posteriorly and the thecal sac. On January 29, 1997, Claimant reported to his employer that his injury occurred when he stepped off the table on August 10, 1994, that he had been bothered with it "ever since," and that it got "considerable worse on January 16, 1997." The same day, January 29, 1997, Vandertie also visited Neurological Surgeons Ltd. in Green Bay, Wisconsin. In preparation for his appointment, he described his symptoms as "pain down right leg. Right foot is all numb. Sometimes also in left leg." He again reported that the "current symptoms began August 10, 1994," and that he stopped working due to the current symptoms on January 16, 1997. In a second form, dated February 11,

1997, Vandertie advised the doctors that his injury occurred on August 10, 1994, and after that he was "off work for various periods," and that the latest period began January 16, 1997. In describing his symptoms, Claimant stated:

> Some pain in lower back. Pain down right leg all the way to the foot. Sometimes pain in left leg. Some numbness in heel of right foot. Top of right foot & toes are completely numb. No feeling of anything. Pain is in same location as Aug. 10, 1994 injury.

Claimant then described that he was doing his normal job driving the front end loader on January 16, 1997 and noticed that during the course of the day his back and leg "were getting painful," as he drove around the shipyard. Claimant noted that the "yard is always rough to drive over." The next day, January 17, 1997, Claimant's pain intensified and he was unable to report to work.

In a report dated January 29, 1997, Dr. Ots reported that Vandertie suffered an on the job injury on August 10, 1994, which an MRI confirmed caused a bulging disc at L5 with no focal herniation. Dr. Ots noted that claimant continued to experience pain but no "significant radicular symptoms," from the 1994, injury, and although he was "involved in no new injury" he began having pain down the right leg on January 16, 1997. Dr. Ots also noted that Claimant denied any left leg pain. Dr. Ots reported his impressions as "Low back and right lower extremity pain and numbness consistent with an S1 radiculopathy. He has evidence of a herniated L5 disc." On February 10, 1997 Dr. Ots again saw Vandertie. He reported lumbar radiculopathy in an S1 root distribution, the absence of right ankle reflex, but improvement since the prior visit in January. By February 24, 1997, Dr. Ots was reporting the resolution of Claimant's pain but continued leg numbness, and on March 10, 1997, he reported that he released Claimant to return to work as of February 25, 1997 with a "reduced capacity" of lifting up to 50 pounds, 1-3 hours driving in an 8-hour day, and occasional bending and squatting. He imposed these restrictions for one month.

In assessing the etiology of Vandertie's January 16, 1997 symptoms, Dr. Ots, in a letter dated January 29, 1997, reported that Claimant, "dates the onset of these symptoms to a work related injury that occurred in 1994.... He was involved in no new injury on January 16... he began having pain down the right leg...." with

numbness of his foot. Dr. Ots described that MRI results as showing "evidence of progression of the herniation of the L5 disc." On November 21, 1997, Dr. Ots reviewed the etiology question. On this occasion, he assessed etiology of Claimant's symptoms experienced on January 16, 1997 as an "aggravation and flare-up of his injury of August 10, 1994." In the next sentence, however, Dr. Ots states, "I believe this is a progression of the 1994 injury."

Cheryl Langreder is Bay Shipbuilding's Occupational Health Nurse. She is a registered nurse and has worked for Bay Shipbuilding for approximately 13 years. In a post-hearing deposition, Langreder explained that she performs a variety of duties ranging from rendering first aid to injured workers to performing physical assessments and filling out preliminary workers compensation documents. In the latter capacity, workers usually report their injuries to her and she takes care of them, refers them to Door County Memorial Hospital for treatment or schedules a visit with their own physician. She maintains a record-keeping system, known as the Kardex system, to keep track of worker injury incidents.

The Kardex system documents the workers' injuries, history, contacts with the Health Office at Bay Shipbuilding regarding injury reports, health related attendance issues, and progress of recovery, for example. Injured employees may report their injuries to their foreman or to the Health Office, but if reported to the foreman, the foreman advises the Health Office. Langreder maintained a Kardex file on Vandertie.

The file reveals that Claimant first reported symptoms of low back discomfort on August 10, 1994. Langreder testified that she received a report from Vandertie, at 2:20 P.M. on that date, that he injured his low back with pain radiating down his right thigh. She took a history and applied ice to the injured area, but did not refer Vandertie for further medical care. Her file reveals that Vandertie missed work due to back pain on August 24, 1994, when he called in to advise that he would be visiting his physician, Dr. K. Heida. Claimant called in to the Health Office to report his progress and returned to work September 12, 1994.

The Kardex record shows that Claimant visited the Health Office on November 28, 1994, and reported increasing pain in both legs, running to the posterior of the knee on the right and to the knee and great toe on the left. He did not report any new incident or aggravating event which triggered these symptoms.

He returned to work about December 7, 1994, after receiving treatment from Dr. Heida.

The Kardex record shows that Langreder received a call on January 27, 1995, advising that Claimant would miss work due to back pain, "from driving the Hough over uneven icy surface in LJD." He returned to work on January 30, 1995. On February 6, 1995, he called to report that he his back was very sore all over, and that he had scheduled an appointment with Dr. Bachhuber. On March 25, 1995, Langreder was on vacation and Vandertie called her at home to report that he experienced pain radiating from his back to his left posterior thigh after dismounting the Hough front-end loader on the previous day, March 24, 1995. Langreder testified that Vandertie advised her that he was never really better after the August 1994 incident and that his condition had waxed and waned since then. Two days later, on March 27, 1995, Vandertie visited Langreder in the Health Office, and expressed concern that he might have difficulty using the clutch on the Hough machine. Langreder consulted with Vandertie's foreman, and the record shows that Vandertie called her at 10:30 A.M. to advise her that he was going home and would schedule a doctor's appointment.

The Kardex record reveals that Vandertie returned to work on April 3, 1995 with a note dated March 28, 1995 from Dr. Bachhuber recommending physical therapy and that Claimant remain off work. Vandertie visited the Health Office on April 10, 1995, with a slip from Dr. Bachhuber stating that Vandertie was recovering from his injuries and could return to work on April 10, 1995. Vandertie advised Langreder at that time that he was continuing with physical therapy. On June 16, 1995 Langreder received a call from Dr. Owens' office advising that Vandertie was released from physical therapy, but should continue at the Door County "Y" for three months. Five days later, on June 21, 1995, Vandertie left a message on Langreder's voice-mail reporting that he was absent due to back and leg soreness. Four days later, on June 25, 1995, Vandertie called in to report that he had been out the previous day due to back pain but that he had taken a vacation day. He reported that he was unable due to back pain to put on his compression stockings.

The Kardex record shows that Vandertie reported periods of absence due to back pain and soreness on September 28, 1995, and November 13, 1995. On

February 9, 1996, Vandertie reported that January 30 or 31, 1996 his left leg gave out due to back pain and precipitated blood clots in his legs. Langreder's records further show that on March 25, 1996, Vandertie reported to her that Wausau Insurance denied Dr. Owen's charges because his treatment related to a new incident on March 24, 1995. Langreder reported that Vandertie denied any new incident and stated that his back and leg pain related to the August 1994 injury, and he repeated that assertion to her on during a May 6, 1996 visit to the Health Office. The Kardex record shows that between February 9, 1996 and November 1, 1996 Claimant had no specific compliant about his low back, and been working regularly.

Vandertie left work early November 1, 1996, due to back problems, and complained about continuing back discomfort on November 7, 1996. On January 20, 1997, Claimant's wife called to report that Claimant had been out of work since January 16th due to back pain, and had visited the emergency room at St. Vincent. She denied any new injury or aggravation but claimed his back just started to hurt again. On January 29, 1997 Vandertie called in to the Health Office to report that an MRI showed a bigger disc bulge and that he had been referred to Dr. Ots, and that he still had numbness in his right foot. On February 6, 1997 Claimant called into Langreder to confirm his appointment with Dr. Ots, and advise that medication helped his leg pain but not the numbness. On February 12, 1997 Langreder asked Vandertie if he was reporting a new injury or accident, and she reports that he stated "No, this is the same sort of problem I've had since I stepped off that table in 311," i.e. the August 10, 1994 accident. Langreder testified that had Vandertie reported a new injury or aggravation she would have prepared LS 202 First Injury Report. On February 25, 1997, Vandertie returned to work having been released by Dr. Ots with restrictions previously noted.

On March 19, 1997, Vandertie and Langreder discussed Claimant's work schedule and agreed that he would continue to work four hours until he could consult with his physician. Langreder subsequently spoke with Dr. Bachhuber on May 1, 1997, who advised her that Dr. Van Saders diagnosed a herniated nucleus pulposus, right at L5/S1, and that Vandertie could return to work with restrictions. Subsequently, Vanderie requested Langreder, on May 6, 1997, to cancel a scheduled epidural block scheduled for May 7. On June 5, 1997, Vandertie again declined to undergo an epidural, expressing concern about the amount of cortisone he taken in the past. Thereafter, following a series of routine contacts with the

Health Office, Vandertie again specifically complained about back pain on November 12, 1997, although the location of the pain was not noted, and complained about lower back and foot pain on December 5, 1997.

Langreder confirmed on cross-examination that if a question arose about which insurance company was responsible for coverage of a particular injury, she would notify both. She also confirmed that the report she received by telephone on January 20, 1997, was from Mrs. Vandertie not Claimant, but she routinely received calls from the spouses of absent workers. She also confirmed that the August 10 ,1994 accident involved Claimant's right and left leg, but no indication of involvement of the right foot, Depo Pgs. 58-59, and that Vandertie returned to work following the August 10 accident with no additional restrictions, as of December 6, 1994, beyond those imposed before the August 10 accident. Pg. 61.

Discussion

It is well-settled that if the current disability is the natural and unavoidable consequence of a work-related injury, then it is related to the first injury and benefits are paid on the basis of the average weekly wage as of the time of the first injury. See, e.g., Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954) (second leg injury at home due to leg instability resulting from the first work-related leg injury); Pakech v. Atlantic & Gulf Stevedores, 12 BRBS 47 (1980) (where Claimant's back gave way both at home while rising from a chair and on the job with another employer one year after a work injury, the condition was the result of a natural progression of the work injury). In this respect, Claimant is assisted by application of the Section 20(a) presumption. In Merrill v. Todd Pacific Shipyards Corp., 25 BRBS at 144, the Board held that:

> Section 20(a) of the Act, 33 U.S.C. §920(a), provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition.

> See, e.g., Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) 2d Cir. 1989). Once claimant has invoked the presumption, the ubrden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See, Del Vecchio v. Bowers, 296 U.S. 280 (1935).

If there has been a subsequent non-work related event, employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was not caused by the work-related event. See James, supra. Employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury. See, e.g., Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987). (Emphasis added).

Section 20 Presumption

It is undisputed that Claimant's low back injury, whether a natural progression of the August 10, 1994 accident or an aggravation of his condition, is causally related to his employment. Further, conditions existed at his job site on January 16, 1997 which could have aggravated or accelerated his condition. The record shows that the shipyard surface was uneven and bumpy as Claimant drove the Hough front-end loader around the yard, jostling him at the controls. The bumpy ride could have aggravated Claimant's condition on January 16, 1997, and Claimant is entitled to the Section 20(a) presumption that it did.

Rebuttal

Since an aggravation of Claimant's condition on January 16th would render Sentry Insurance liable, Sentry must establish facts sufficient to rebut the presumption. Its burden is to adduce evidence which may reasonably be accepted as adequate to support the conclusion. American Grain Trimmers, Inc. v. OWCP, 181 F.3d 810 (7th Cir. 1999). If it succeeds, the record as a whole must be considered to determine whether Claimant suffered a new injury or aggravation on January 16, 1997.

Sentry contends that Claimant suffered no new injury or aggravation on January 16, 1997, and his own statements denying that he suffered any specific event precipitating the onset of his pain that day, in Sentry's view, rebuts the presumption. The issue of the etiology of a physical condition, however, is a medical question. Thus, while Claimant's contemporaneous statements constitute a factor which must be considered, I find more persuasive the fact that following the August 10, 1994 low back injury, Claimant suffered on-going low back problems. Indeed, when the physicians at St. Vincent Hospital contacted Dr. Bachhuber upon Claimant's visit to the emergency room on January 17, 1997, for low back pain radiating into the right buttock and lower extremity, Dr. Bachhuber advised them that Claimant "has been through this before." This assessment by Dr. Bachhuber is consistent with Dr. Ots' subsequent evaluation on January 29, 1997, attributing Vandertie's symptoms to the August, 1994 injury, and confirming that "he was involved in no new injury but on January 16, he began having pain down the right leg." While there are inconsistencies in Dr. Ots' report which I will discuss in greater detail, his observation that Claimant was involved in no new injury, confirms the observation by Dr. Bachhuber that Claimant had on-going experience with the type of symptoms he suffered on January 16 and 17, 1997, and Claimant's own denial of any new injury. These facts are sufficient to rebut the presumption.

Natural Progression
or Aggravation

In view of the foregoing, it is necessary to consider the record as a whole to determine whether Claimant's condition is a natural progression of his August 10, 1994 injury or whether he suffered an aggravation or exacerbation of his condition at work on January 16, 1997. The principles which differentiate a natural progression from an aggravation are fairly well-settled and easy to articulate. In actual application, however, these principles in specific fact circumstances involve

complexities fraught with nuance.

The issue is whether the medical evidence submitted by the parties permits a determination of that the disability is the natural and unavoidable result of a prior injury or is due to acceleration, aggravation, or exacerbation of a pre-existing condition. In the latter situation, the employee has sustained a new and discrete injury. Thus, if a Claimant's employment aggravates a non-work-related underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). The second work-related injury need not be the primary factor in the resultant disability for compensation purposes. See generally Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). If the injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable, Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968), and liability therefore must be assumed by the employer or carrier for whom Claimant was working when "reinjured." Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g. 15 BRBS 386 (1983); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd. mem. sub nom. Williamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982).

Under the "aggravation rule," where an employment-related injury combines with, or contributes to, a pre-existing impairment or underlying condition, the entire resulting disability is compensable and the relative contributions of the work-related injury and the pre-existing condition are not weighed to determine Claimant's entitlement. See, e.g., Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir., 1986). In Johnson v Ingalls Shipbuilding, 22 BRBS 160 (1989), the BRB opined that Dr. Childs, whose opinion was relied on by the judge in his discussion of the extent of Claimant's compensable impairment, determined that both chronic obstructive pulmonary disease and asbestosis contribute to Claimant's overall lung impairment. The judge did not discredit either this determination or Dr. Childs' assessment that Claimant's breathing difficulties, taken together, result in a 50 percent permanent impairment. Under the aggravation rule, therefore, the BRB concluded that the employer would be required to compensate Claimant for a 50 percent impairment, as Claimant contends.

In contrast, if the disability results from the **natural progression** of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the Claimant was working when he was first injured. Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g. 15 BRBS 386 (1983); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd. mem. sub nom. Williamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982).

In Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991), for example, the employee sustained a work-related low back injury on July 30, 1985. He was paid benefits while he was unable to work. He returned to work for approximately fourteen months and was then laid off on February 26, 1987. Six weeks later, while at home, he experienced back pain while bending over doing yard work. The employer paid additional benefits for five weeks then terminated benefits, contending that the employee's April 10, 1987 accident was an intervening, non-compensable injury.

In Merrill, the Board held that it was undisputed that the Claimant suffered a back injury while working in 1985 and that he suffered ongoing back problems; thus, the Section 20(a) presumption was invoked, See, generally Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CFR) (2d Cir. 1989). Thus, the Board affirmed the judge's conclusion that the Claimant did not sustain a new injury in 1987 and that his lumbar condition (i.e., recurring chronic pain), was the natural and unavoidable consequence of his 1985 injury, causally related to his employment and, thus, was compensable. Merrill, 25 BRBS at 144-45. Moreover, where the employee's condition is the natural progression of a work-related injury, any compensation awarded is based on the average weekly wage as of the work-related injury. Merrill, 25 BRBS at 150.

The employer, of course, is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an intervening cause, however, the employer is relieved of liability for that portion of disability attributable to the second injury. See, e.g., Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (l987). See Intervening Cause, Topic 2.2.8.). Moreover, an employment injury need not be the sole cause of a disability for compensation liability. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Haynes v. Washington Metro Area Transit Auth., 7 BRBS 891

(1978). Thus, if the disability resulted from the natural progression of an earlier injury and would have occurred notwithstanding the presence of a second incident, then the earlier injury is compensable and the carrier on the risk as of that date is responsible for the benefits due the Claimant. Madrid v. Coast Marine Constr. Co., 22 BRBS 148, 153 (1989); Wheeler v. Interocean Stevedoring, 21 BRBS 33 (1988); Crawford v. Equitable Shipyards, 11 BRBS 646, 649-50 (1979), aff'd sub nom, Employers Nat'l Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

The basis rule of law in "direct and natural consequences' cases is stated in 1 A. Larson Workmen's Compensation Law, §13.00 at 3-502 (1992):

> When the primary in jury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to Claimant's own intentional conduct.

Professor Larson writes at Section 13.11:

> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and sequella that flow from the primary injury are compensable ... The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. Id. at 3-517.

This rule is stated in Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." *See also*, Bludworth Shipyard v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mississippi Coast Marine v. Bosarge, 637 F.2d 994, modified and reh'g denied. , 657 F.2d 665 (5th Cir. 1981); Hicks v. Pacific

Marine & Supply Co., 14 BRBSA 549 (1981).

The area of inquiry is whether the factual pattern presents the trier of fact with a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. See, Andras v. Donovan, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable, as long as the worsening is not shown to have been produced by an independent cause. Hayward v. Parsons Hospital, 32 A. 2d 983, 301 N.Y.S. 2d 649 (1960).

In this instance, Claimant argues that the symptoms he experienced on January 16, 1997 represent an aggravation of his previous injury caused by the jarring he experienced when he operated the front end loader over frozen ground in the shipyard. He felt significant discomfort at the end of the day. Citing Vanover v. Foundation Contractors, 22 BRBS 453 (1989), Claimant also asserts that his back injury should be treated as an occupational injury, not a traumatic injury.

In Vanover, the Board entertained an analysis of a back injury as analogous to an occupational disease situation, but Claimant fails to appreciate the limitations of its holding. Thus, in footnote 1 of its decision the Board specifically noted that all parties treated the back injury as an occupational disease throughout the proceedings. More important, the Board observed that the Administrative Law Judge expressly found that Claimant's condition was aggravated by his employment through October 1977, and consequently, whether claimant's injury was treated as a traumatic injury or an occupational disease, the result would be the same. Vanover at 456 fn.1. The Board did not hold that, absent evidence of aggravation, that the result would be the same. To the contrary, as Claimant notes, Steed v. Container Stevedoring Co., 25 BRBS 210 (1991), holds that aggravation of a pre-existing lumbar condition should not be treated as an occupational disease for purposes of determining whether the last employer would be liable for disability benefits.

Claimant contends, however, that Steed sets up a distinction without a significant difference, because in applying the aggravation rule, the Board merely avoided determining whether a "hazardous condition" existed at Claimant's worksite. As Claimant analyzes the Steed decision, "If the 'occupational hazard' requirement had been met, there would have been no reason to distinguish orthopedic conditions from occupational diseases." See, Cl. Brief at 3. Claimant's logic, however, is unsound.

Both Vanover and Steed involved affirmative findings of aggravation of a pre-existing condition. Neither ruled that in the absence of the aggravation, the last employer would be liable whether or not a "hazardous condition" existed. Vanover simply observed that an aggravated injury and an occupational disease could result in similar outcomes, but Steed demonstrates that these two types of injuries need not necessarily converge.

Claimant's condition will, therefore, be evaluated as a traumatic injury under the "aggravation rule," and as noted above, his case is fraught with countervailing complexities. Initially, Claimant and Wausau Insurance, the carrier at risk if Claimant's condition is the natural progression of his August 10, 1994, accident, note that following the August 1994 injury, Claimant's low back pain waxed and waned in conjunction with his job as a front-end loader operator with minimal treatment and no additional increases in his restrictions. Most of 1996 past, according to Claimant and Wausau, without any low back complaints. Following a bumpy ride over rough, frozen terrain on January 16, 1997, the "picture changes." After finishing the day's work, Claimant experienced increased low back pain radiating into the right lower extremity, and was unable to get out of bed the next day.

Claimant and Wausau argue further that as a result of trauma he suffered on January 16, 1997, Claimant suffered new symptoms of pain in the right lower leg and numbness in the right foot, a larger herniation as shown on the MRI, a month off work, and new work restrictions over and above those previously imposed. Claimant further contends that there is a lack of medical evidence that his low back condition was progressively degenerating "regardless of work activity," and, therefore, his symptoms after work on January 16, 1997 were not merely the natural progression of the August 10, 1994 injury.

As noted above, cases of this type are always difficult to resolve when a claimant's symptoms are attributable to no particular subsequent incident at work, but seem to evolve following an earlier injury. Indeed, Claimant himself consistently informed his doctors and his employer that his low back symptoms in the latter part of 1994 and thereafter, including January 16, 1997, and subsequently, were related to his August 10, 1994, injury. To be sure, Claimant emphasizes that he was jostled about by the bumpy ride in the Hough as he traversed the frozen ground of the shipyard on January 16, 1997, but there was nothing unusual about this. In his February 11, 1997 report Claimant observed that the yard is "always rough to drive over." He noticed back and leg discomfort during the course of his shift on January 16, 1997, but his condition had waxed and waned prior to that date.

Claimant had reported episodes of pain and discomfort not only in his low back and left leg but in his right leg as well following the August 10, 1994 accident and he consistently attributed his symptoms to that injury. Nevertheless, I do not rely solely upon Claimant's assessment of the etiology of his symptoms, although the fact that he perceived no precipitating incident on January 16 is a factor I have considered.

The medical evidence addressing the question of etiology is mixed. Thus, Dr. Bachhuber, Claimant's treating physician advised St. Vincent Hospital staff physicians that Vandertie had before been through the type of incident he experienced on January 16. His "surprise" that Claimant had sought emergency room treatment on this occasion reasonably suggests that Dr. Bachhuber did not perceive this as a new injury. Vaandertie had, as Dr. Bachhuber observed, been through this "before." Dating from August 10, 1994, Claimant's low back condition was, according to Claimant, Dr. Bachhuber, and Dr. Ots an on-going problem that caused him recurring pain not only in the low back and left leg but in his right leg as well.

Claimant emphasizes, however, that the numbness he experienced in his foot after January 16, 1997 was a new symptom, and his MRI, as interpreted by Dr. Kohlhase on January 24, 1997, clearly showed an increase in the degree of disc protrusion at L5/S1since the August, 1994 MRI. Dr. Kohlhase, however, did not assess the etiology of the increased pathology he detected.

Nor does Dr. Ots' reports shed clarifying light on this issue. He was aware of Dr. Kohlhase's MRI report, the pain radiating down Claimant's right leg, the new symptom of lower extremity numbness, and the increased work restrictions when he reported that Claimant was involved in "no new injury" on January 16, 1997. While the record may, as Claimant argues, be devoid of evidence of "degeneration" between August of 1994 and January of 1997, there is evidence that Claimant's condition waxed and waned during this period, and on January 29, 1997, Dr. Ots described the January 24, 1997, MRI results as indicative of "progression of the herniation" of the disc attributable to the August 10, 1994 injury.

I am mindful, as I previously mentioned, that Dr. Ots' evaluation is not entirely consistent. On November 21, 1997, Dr. Ots again addressed the etiology of Vandertie's symptoms. On this occasion, he opined that Vandertie experienced an "aggravation and flare-up" of his August 10, 1994 injury, and, as such, this would seem to alter or modify the etiology assessment in his earlier report. Yet, in the next sentence Dr. Ots again described the symptoms, as he did in his January 29

report, as "a progression of the 1994 injury."

Now the problem here is not the application of technical legal principles differentiating "progression" from "aggravation." The difficulty rests in a medical assessment of etiology which at once attributes Claimant's symptoms to an aggravation on January 16, 1997 and simultaneously attributes it to the progression of the August 10, 1994 injury. The result is a record which fails to establish a medical etiology for Claimant's January 16, 1997 symptoms sufficient to conclude that he sustained an on-the-job aggravation of his low back condition on that date. Thus, it would constitute pure speculation to construe Dr. Ots' opinion as meaning either that Claimant suffered an aggravation of his earlier injury which caused its exacerbation and progression on January 16, or alternatively, and to the contrary, that the August 10, 1994 injury, by January 16, 1997, had merely progressed to the point that Claimant's symptoms were aggravated and flared-up without further incident. His report is equally susceptible of both interpretations, and, therefore, provides substantial evidence for neither. The meaning of Dr. Ots November 21, 1997, evaluation is rendered even murkier by his earlier observation, which the November 21, 1997 report does not specifically address, that Claimant sustained "no new injury" on January 16, 1997.

Since the Section 20 (a) presumption has been rebutted, the etiology of Claimant's symptoms is a medical question, and the burden of establishing an aggravation or exacerbation of his previous injury rests with Claimant. I have carefully weighed the evidence establishing the increased pathology on the MRI; however, as previously noted, Dr. Kohlhase does not opine in respect to the cause of the pathology he observed, and Dr. Ots' evaluation of etiology is undifferentiated. Consequently, Dr. Ots' assessment of the cause of Claimant's symptoms including the right foot numbness does not establish an aggravation of his condition. To the contrary, considering Claimant's consistent insistence that his symptoms are attributable to the August 10, 1994 injury, that his condition waxed and waned since August 1994, and further considering Dr. Bachhuber's medical opinion Claimant's condition as of January 17, 1997 had happened before, and attributing it to the August, 1994 injury, and Dr. Ots' observation that Claimant suffered no new injury on January 16, 1997, I find and conclude that Claimant has failed to establish that symptoms he suffered in his low back and lower right extremities on January 16, 1997, and thereafter was an aggravation, acceleration, or exacerbation rather than a natural progression of his August 10, 1994, injury. As such, his claim for injuries sustained on January 16, 1997, must be denied. Accordingly;

ORDER

IT IS ORDERED that the claim for compensation based upon a new injury on January 16, 1997, be, and it hereby is, denied

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STUART A. LEVIN
Administrative Law Judge